

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
April 24, 2008 Session

IN RE: THE ADOPTION OF A MALE CHILD WHOSE NAME IS D.B.S.M.

**Appeal from the Chancery Court for Blount County
No. 06-120 Telford E. Forgety, Jr., Chancellor**

No. E2007-02663-COA-R3-PT Filed June 23, 2008

S.L.H.M. ("Mother") and D.S.M. ("Husband") filed a Petition to Terminate Parental Rights and For Adoption of Minor Child ("Petition") seeking, in part, to terminate J.L.P.'s ("Father") parental rights to the minor child D.B.S.M. ("the Child"). After a trial, the Trial Court entered an order finding and holding, *inter alia*, that clear and convincing evidence of grounds for termination of Father's parental rights to the Child had not been proven, and that there was no clear and convincing evidence that it was in the best interest of the Child for Father's parental rights to be terminated. Mother and Husband appeal to this Court. We hold that although clear and convincing evidence exists of grounds for the termination of Father's parental rights, the record does not contain clear and convincing evidence that it is in the best interest of the Child for Father's parental rights to be terminated. We, therefore, affirm the dismissal of the Petition.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed;
Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Theodore Kern, Knoxville, Tennessee for the Appellants, D.S.M. and S.L.H.M.

Robert M. Cohen, Maryville, Tennessee for the Appellee, J.L.P.

OPINION

Background

Father moved in with Mother in October of 2004. Mother found out she was pregnant during her doctor's visit on February 2, 2005. Mother told Father about the pregnancy that afternoon. Father moved out of Mother's home on February 10, 2005. The Child was born in September of 2005.

Mother married Husband in June of 2006. In July of 2006, Mother and Husband filed the Petition seeking, in part, to terminate Father's parental rights to the Child. The case was tried without a jury in May of 2007.

Mother testified at trial that when she told Father about the pregnancy:

At first, he began discussing how our lives would change and how we would, how we would handle the situation, how we could put a crib in the main bedroom and things like that....[Then] [h]is ex-wife came to pick up his other three children and he spent at least thirty minutes outside talking with them. And when he came back into the house, he said that he and his daughter didn't want any more - - she didn't want any brothers and sisters and he didn't want any more children, that he had three and that was all he ever wanted.

After that conversation, Mother and Father went to Mother's parents' house and shared the news about the pregnancy with her parents. Father moved out of Mother's home a few days later, on February 10, 2005. Mother testified that Father "stated again that he only had three children and that's all he wanted and that he didn't want any more."

Mother testified that she had no contact with Father from the time he moved out of her home until August of 2005 when Father came to the bank where Mother worked and spoke to Mother in the parking lot. Mother was approximately eight months pregnant at that time. Mother testified that Father "said that he wanted the child, that he knew it [was] his, and that he wanted to take the baby away from me. At that point, he didn't know whether it was male or female." Mother testified: "I was scared because he was angry. And if he wanted to be a part of the child's life, I, I definitely wouldn't have allowed it to be sole custody. I wanted joint custody of him. But that's what he implied, that he wanted custody."

Mother testified that she saw Father's name on her telephone's caller id at her home several times during her pregnancy, but that these calls came during the early afternoon when Mother was at work. Father never left a message on Mother's answering machine. Mother testified that she saw Father's name on her caller id "[a]bout four times" during the time she was pregnant, but that Father never tried to call after the baby was born. Mother never called Father back "[b]ecause he had said that he didn't want to be a part of our lives. And, also, all the times that he had ever called, he knew that I wouldn't be home. So, it didn't seem to me that he was really invested in wanting to be a father." Mother testified that she found Father's address on the Internet and that Father was living approximately one mile from where Mother lived.

Mother began dating Husband when she was seven months pregnant with the Child. Husband was in the delivery room when the Child was born. Mother and Husband moved in together when the Child was one or two months old. Mother and Husband married in June of 2006. Mother testified that Husband is the only father that the Child has ever known. Mother and Husband have a daughter together who was four months old at the time of trial.

Mother testified that she wants Father's parental rights terminated "[b]ecause [the Child] is a happy, loving child, and he already has a relationship with my husband, He doesn't know [Father] at all. And I think that it would be wrong to change his life. He's already had - - He already has a good life established."

Mother testified that she never contacted Father after he moved out even though she knew his address and phone number. She never contacted Father to tell him when the Child was born. Mother did not have Father's name listed on the birth certificate because Father was not there to sign it. Mother also testified that she did not file a petition to establish Father's paternity because "[Father] said that he didn't want to be a dad. So, I didn't think that it was necessary because he said that he wasn't going to be around."

Father never paid any of Mother's prenatal expenses or any money toward the support of the Child prior to the filing of the Petition. Mother testified that after the Petition was filed, Father has paid "[r]oughly four hundred dollars" in support.

Father has custody three nights a week of the three daughters he had with his ex-wife. Father pays child support to his ex-wife for his three daughters. Father made approximately twenty-nine thousand dollars in 2006. He pays \$86.53 every week in support for his daughters and has never been behind in a support payment. Father's ex-wife testified:

I feel like [Father] is a good father [to our three daughters]. He is a great influence. He's, he's always been there to each and every doctor's appointment for [the oldest daughter] and most for the other two children as much as possible. He attends school meetings as much as possible. He takes them to school every Friday whenever he has them on Fridays, which is most Fridays. Gets a chance to speak with their teachers. Goes on school field trips when possible. And, overall, I feel like he's a great father.

Father testified that DNA testing done after the Petition was filed shows that he is the biological father of the Child. Father admitted that he lived with Mother only for about one week after she told him she was pregnant. He testified that he moved out of Mother's house because:

We weren't getting along very well. And at this point, it was the best interest of my, my three daughters to move out because they just - - It was like four kids in the house. You know, [Mother and my three daughters] were all the time bickering continuously. And things wasn't getting no worse (sic). And I suggested to her - - About a month before that that I was going to move out because - - and separate for a little while. And then she said, "If you move out, you don't need to come back".

Father testified that he told Mother he was moving out before she told him she was pregnant and that his decision to move out had nothing to do with the pregnancy.

According to Father, he attempted to contact Mother after he moved out and before the birth of the Child and actually spoke with Mother twice, once on the phone and once when he visited her at work. Father testified that when he visited Mother at work while she was pregnant, Mother told him that the child “wasn’t mine, that I didn’t need to be bothering her; she had a happy family.” Father also testified that he called Mother’s home phone number several times and

left messages on her answering machine, explained to her that I’m not mad, that what had happened between me and us - - or me and her was, was in the past and I wanted to know about the child, if he was mine or not. I even asked at the time if he was a boy or a girl.

Father testified that he never told Mother that he did not want to be a father to the Child. When asked if he was happy when he learned that Mother was pregnant, Father testified:

It wasn’t that I wasn’t happy. It was that I was stunned, you know, because I, I did have three siblings (sic). And one other I wasn’t ready for at the time. But when you have a child, there’s no ready for it or not; it’s yours. And I was willing to be there full time for him or her, whichever it might have been. And I would have liked to have been there, but I wasn’t allowed to be.

He stated:

I never threatened to take the child. I asked for a DNA test numerous times of phone messages, in the parking lot at her job. And I even asked her mother to relay a message to her that I would like to speak to her at some time if she wasn’t busy because every time I called, they said she wasn’t there or she was gone, you know, or sleeping. And I was just trying to get in contact with her in some way.

Father admitted that he never tried to call Mother after the Child was born. He stated: “Up until July whenever I got the papers, I wasn’t aware of when he was even born or even if he was born at the time.” Father further testified:

I was never even called or told when she had it. And no one would answer my phone calls when I tried to call to find out when she was going to have it and to pay to get a paternity test to find out whether it was mine or not. And she told me that it was not mine, that it was David’s. And her mother had told me that it was Derek’s.

When asked why he thought the Child might not have been his, Father responded:

Well, it was [Mother] was coming home late. We was having arguments. And for awhile, she was just coming in and going to the bedroom. And a few times that she had been talking on the phone to [her ex-boyfriend]. And we had got into argument (sic) about me talking to my ex-wife on a daily basis, of course, about the kids. And I had - - would meet - - Depending on what time I got off from work, whether my ex-wife was out or not, I’d meet her somewhere. And at one point, I was being accused

of doing something with her behind [Mother's] back. And, so, I had had her start meeting me over at [Mother's] job at the mall. And, you know, at that time, somebody accusing you of doing something is normally doing something theirself. And I had caught her several times talking to [her ex-boyfriend] on the phone and denied that it was him, that she was talking about schooling and things, and how he was doing and so forth.

When questioned, Father admitted that when he talked about Mother coming home late he meant eight-thirty and that Mother sometimes worked until eight o'clock. Father also testified Mother told him that the Child was Husband's when Father visited Mother at her job while she was pregnant. Mother denied ever telling Father that the Child was not his.

Father testified that from the time he spoke with Mother's mother while Mother was still pregnant until the time he was served with the Petition:

I called several lawyers to hire, but I couldn't afford one at the time. Every one I called wanted twenty-five hundred dollars up front. And I didn't have the money for that at the time.... I didn't call Child Support, but I called up here. And they don't do Court appointed lawyers for that. And I also called the Red Cross to see if they would give any assistance to something like that. And they don't do it, either.... And then I began to start saving money in order to get up the money to get a lawyer.... I felt at the time, I done the best I could.

Father testified that he was saving up money to hire an attorney and that he had saved up approximately fourteen hundred dollars when he was served with the Petition. After being served with the Petition, Father borrowed from his brother the rest of the money needed to pay for an attorney.

Father testified that he has seen the Child only one time "[a]t a distance. It was this last Halloween. He was probably fifteen feet, sixteen feet in front of me. And it was a glimpse of him. And then I turned around and they were gone."

At the time of trial, Father was living with another woman. Father was listed on the birth certificate as the father of this woman's child when that child was born in August of 2006, but DNA testing later revealed that Father was not the biological father of that child. Father attended prenatal appointments with his current girlfriend and paid some of the expenses for her child.

Father admits that before the filing of the Petition, he never gave Mother any money for the support of the Child and that he never registered with the Putative Father Registry as a potential father of the Child. When asked why he did not want his parental rights terminated, Father testified:

Because I feel that he's - - I mean, I haven't got to see him yet, but him being my child, I love him with all my heart and I want to be part of his life. And I just feel that he's my son and I should be with him and he needs the father and son bonding.

After trial, the Trial Court entered an order on November 13, 2007 dismissing the Petition and finding and holding, *inter alia*, that clear and convincing evidence of grounds for termination of Father's parental rights to the Child had not been proven, and that there was no clear and convincing evidence that it was in the best interest of the Child for Father's parental rights to be terminated. The Trial Court specifically found that Father had exhibited a lack of credibility in claiming that he was told he was not the father of the Child, and that although he attempted to make contact with Mother a few times before the birth of the Child, he had made no attempts to contact Mother after the birth of the Child and also had made no attempts to pay for any prenatal, natal, or postnatal expenses for the Child prior to the filing of the Petition. The Trial Court found that Father "did nothing and has not demonstrated the level of interest and responsibility in this child he should have demonstrated."

Mother and Husband appeal to this Court.

Discussion

Although not stated exactly as such, Mother and Husband raise two issues on appeal: 1) whether the Trial Court erred in holding that they did not establish by clear and convincing evidence that grounds existed to terminate Father's parental rights to the Child under Tenn. Code Ann. § 36-1-113; and 2) whether the Trial Court erred in holding that Mother and Husband did not establish by clear and convincing evidence that the termination of Father's parental rights was in the best interest of the Child.

Our Supreme Court reiterated the standard of review for cases involving termination of parental rights in *In re F.R.R., III*, stating:

This Court must review findings of fact made by the trial court *de novo* upon the record "accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. R. App. P. 13(d). To terminate parental rights, a trial court must determine by clear and convincing evidence not only the existence of at least one of the statutory grounds for termination but also that termination is in the child's best interest. *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002) (citing Tenn. Code Ann. § 36-1-113(c)). Upon reviewing a termination of parental rights, this Court's duty, then, is to determine whether the trial court's findings, made under a clear and convincing standard, are supported by a preponderance of the evidence.

In re F.R.R., III, 193 S.W.3d 528, 530 (Tenn. 2006).

Mother and Husband argue that there is clear and convincing evidence that Father's parental rights should be terminated pursuant to Tenn. Code Ann. § 36-1-113(g)(1) and (g)(9). In pertinent part, Tenn. Code Ann. § 36-1-113(g)(1) provides:

(g) Initiation of termination of parental or guardianship rights may be based upon any of the following grounds:

(1) Abandonment by the parent or guardian, as defined in § 36-1-102, has occurred;

Tenn. Code Ann. § 36-1-113(g)(1) (2005). The term ‘abandonment’ is defined in Tenn. Code Ann. § 36-1-102, which provides:

(1)(A) For purposes of terminating the parental or guardian rights of parent(s) or guardian(s) of a child to that child in order to make that child available for adoption, “abandonment” means that:

(i) For a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading to terminate the parental rights of the parent(s) or guardian(s) of the child who is the subject of the petition for termination of parental rights or adoption, that the parent(s) or guardian(s) either have willfully failed to visit or have willfully failed to support or have willfully failed to make reasonable payments toward the support of the child;

Tenn. Code Ann. § 36-1-102(1)(A)(i) (2005).

In pertinent part, Tenn. Code Ann. § 36-1-113(g)(9) provides:

(9)(A) The parental rights of any person who, at the time of the filing of a petition to terminate the parental rights of such person or, if no such petition is filed, at the time of the filing of a petition to adopt a child, is not the legal parent or guardian of such child or who is described in § 36-1-117(b) or (c) may also be terminated based upon any one (1) or more of the following additional grounds:

(i) The person has failed, without good cause or excuse, to pay a reasonable share of prenatal, natal, and postnatal expenses involving the birth of the child in accordance with the person’s financial means promptly upon the person’s receipt of notice of the child’s impending birth;

(ii) The person has failed, without good cause or excuse, to make reasonable and consistent payments for the support of the child in accordance with the child support guidelines promulgated by the department pursuant to § 36-5-101;

(iii) The person has failed to seek reasonable visitation with the child, and if visitation has been granted, has failed to visit altogether, or has engaged in only token visitation, as defined in § 36-1-102(1)(C);

(iv) The person has failed to manifest an ability and willingness to assume legal and physical custody of the child;

(v) Placing custody of the child in the person’s legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the child; or

(vi) The person has failed to file a petition to establish paternity of the child within thirty (30) days after notice of alleged paternity by the child’s mother, or as

required in § 36-2-318(j), or after making a claim of paternity pursuant to § 36-1-117(c)(3).

* * *

(B)(ii) “Notice” also means the oral statement to an alleged biological father from a biological mother that the alleged biological father is believed to be the biological father of the biological mother’s child.

Tenn. Code Ann. § 36-1-113(g)(9) (2005). The grounds in Tenn. Code Ann. § 36-1-113(g)(9) are “less difficult to prove.” *In re Adoption of S.M.F.*, No. M2004-00876-COA-R9-PT, 2004 Tenn. App. LEXIS 826, at *17 (Tenn. Ct. App. Dec. 6, 2004), *no appl. perm. appeal filed*. These grounds may be used to terminate the parental rights of “persons who have established legal parentage, but did so subsequently to the filing of a petition seeking termination of their parental rights.” *In re D.A.H.*, 142 S.W.3d 267, 272-73 (Tenn. 2004).

The record on appeal reveals that the Child was approximately ten months old when the Petition was filed. Father testified that he made no effort to contact Mother after the Child was born and that he made no payments toward the support of the Child until the filing of the Petition. Father failed to pay any prenatal, natal, or postnatal expenses for the Child. The record also reveals that Father made approximately twenty-nine thousand dollars in 2006, the year that the Petition was filed. As the evidence shows that Father pays child support for his three daughters and that Father has never been behind in a support payment, Father clearly understands his obligation to support his children. The Trial Court specifically found that Father was not credible when he claimed that he was told he was not the Child’s father. Father took no steps to establish his legal parentage of the Child until after the filing of the Petition. Given all this, there is clear and convincing evidence in the record to terminate Father’s parental rights to the Child under either Tenn. Code Ann. § 36-1-113(g)(1) or (g)(9). However, this does not end the inquiry. Parental rights may be terminated only if grounds for termination are proven and if the termination of parental rights is in the best interest of the child. *See, e.g., In re F.R.R., III*, 193 S.W.3d at 530.

The factors a trial court must consider when deciding whether the termination of parental rights is in the best interest of a child are set forth in Tenn. Code Ann. § 36-1-113(i). In relevant part, these factors are:

- (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child’s best interest to be in the home of the parent or guardian;
- (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
- (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;

- (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
- (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;
- (6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;
- (7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;
- (8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or
- (9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

Tenn. Code Ann. § 36-1-113(i) (2005).

The record is devoid of evidence showing that it would be in the best interest of the Child for Father's parental rights to be terminated. The record reveals that Father is a good parent to his three daughters. Mother testified that she wants Father's parental rights terminated "[b]ecause [the Child] is a happy, loving child, and he already has a relationship with my husband, He doesn't know [Father] at all. And I think that it would be wrong to change his life. He's already had - - He already has a good life established." However, as our Supreme Court has stated, parental rights "may not be forfeited in a balancing test or to another man who may appear to be a more ideal father." *In Re: T.K.Y.*, 205 S.W.3d 343, 352 (Tenn. 2006). There is no reason why the Child cannot continue to enjoy the strong bond and relationship he has with Husband and also develop a relationship with Father. We have determined from our review of the record that the Trial Court's best interest finding, made under a clear and convincing standard, is supported by a preponderance of the evidence. We, therefore, affirm the Trial Court's dismissal of the Petition to Terminate Parental Rights and For Adoption of Minor Child.

Conclusion

The judgment of the Trial Court is affirmed and this cause is remanded to the Trial Court for collection of the costs below. The costs on appeal are assessed against the Appellants, D.S.M. and S.L.H.M. and their surety.

D. MICHAEL SWINEY, JUDGE